No. 12,482

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC PORTLAND CEMENT COMPANY
(a corporation),
Appellant,

vs.

WILLIAM A. BELLAMY,
Appellee.

BRIEF FOR APPELLEE.

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The parties will be designated as they were in the trial court, except that all reference to the defendant (unless otherwise indicated) will be to the defendant Pacific Portland Cement Company, the appellant. All references to pages are, unless otherwise indicated, to the pages of the transcript of record.

I. STATEMENT OF THE CASE.

The case attempted to be presented by appellant in its brief and its "Statement of Facts" is not the one which was tried and submitted to the jury.

In so far as the brief purports to deal with determinative facts, it rests either upon mere assertion or upon mere portions of the testimony necessarily considered and rejected by the jury. It fails to recognize or apply the elementary rule that the evidence will be interpreted in the light most favorable to the plaintiff and that the jury returned a verdict in favor of the plaintiff and against the defendant rather than against the plaintiff and in favor of the defendant.[1] It proceeds upon the assumption that plaintiff was bound by the testimony of defendant's witnesses, particularly its driver. It overlooks the fact that the jury was entitled to rest its verdict upon the evidence as a whole, including such testimony of defendant's witnesses as was favorable to him[2] and even upon evidence contrary to the testimony of plaintiff himself.[3] By such methods the appellant achieves a false and misleading "Statement of Facts" and upon such predicate seeks to bind appellee by inapplicable propositions of law.

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[1] *Southern Pacific Co. v. Souza* (9 Cir. 1950) 179 F. 2d 691;
Everett v. Southern Pacific Co. (9 Cir. 1950) 181 F. 2d 58;
Primm v. Market St. Ry. Co. (1943) 56 Cal. App. 2d 480, 132 P. 2d 842;
Gamer v. New York Life Ins. Co. (9 Cir. 1935) 76 F. 2d 543.

[2] *Ford Motor Co. v. Pearson* (9 Cir. 1930) 40 F. 2d 858, 864-865:
"In determining whether this question was properly submitted to the jury, an appellate court in the case of a disagreement between the testimony of witnesses, where the case is properly one for the consideration of a jury to be determined by their judgment as to the truth or falsity of the testimony, must assume that they disbelieved the witnesses whose testimony conflicts with their conclusion, and believed the witnesses whose testimony would support the verdict."

[3] *Primm v. Market St. Ry. Co.* (1943) 56 Cal. App. 2d 480, 132 P. 2d 842;
Gibson v. Mendocino County (1940) 16 Cal. 2d 80, 105 P. 2d 105;
Parker v. Manchester Hotel Co. (1939) 29 Cal. App. 2d 446, 85 P. 2d 152.

Equally misleading and equally unhelpful are the claims of error presented by this appeal. The fact is that the case was tried under rulings by the court and submitted to the jury under instructions more favorable to the appellant than to which it was entitled. This, we think, will become patent as we review the record.

A simple statement of the ultimate facts, which the jury was entitled to find, is the following:

Defendant's driver, Joseph E. Carlson, in broad daylight, with the weather clear and his view unobstructed from the time he rounded the curve to the east more than 1,000 feet away, ran down the plaintiff giving train signals with arms outstretched, on the highway in front of him. Carlson knew that plaintiff and trainmen like him, by reason of the proximity of the highway and the tracks, would, in carrying out their duties as freight trainmen, be required to be in the highway in front of him. He had known this for more than eighteen years.

He either actually saw plaintiff in the highway and ran him down, or, without looking, but knowing he would be there, nevertheless ran him down. He did this in either case, without warning signal, without slowing his vehicle, and without taking any steps to avoid striking plaintiff.

Since these facts, if the jury had the right to find them, are decisive of all propositions raised by the defendant, we shall set out the testimony establishing them either by references to the transcript page, or by the testimony itself.

At the time of the accident it was broad daylight with the weather clear. Plaintiff's witness, Locomotive Engineer Frank G. Edwards, testified, "And what was the

condition at that time in respect to visibility? A. It was broad daylight. Q. And as to visibility, was it good or bad [or] otherwise? A. Very good, clear'' (176-177).

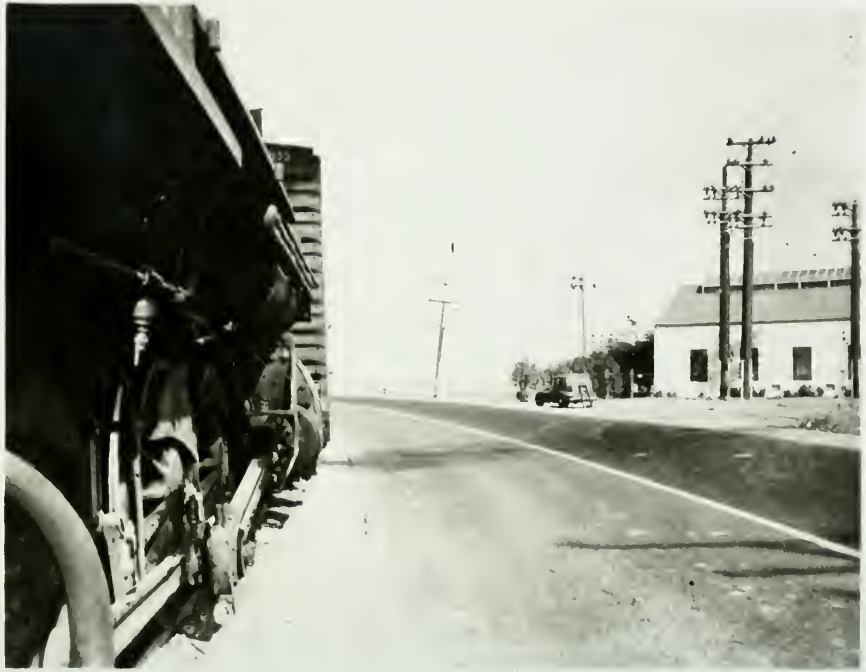
The physical situation at the place of the accident is shown by photographs (Plff. Exh. No. 19), made a part of this brief. A plat, a photostatic copy of which appears in appellant's brief between pages 10 and 11, was used for purposes of illustration. The overhang of the freight cars beyond the nearest rail and into the highway is shown by a photograph (Plff. Exh. No. 31).

From these exhibits and the testimony it appears that the Redwood Harbor Road, on which the accident occurred, lying west to east, parallels the adjoining spur track to the north. As characterized by appellant ''Near the scene of the accident this spur track curves slightly to the north.'' The overhang of the freight cars over the ends of the ties is such that a trainman working that side of the train would necessarily drop off upon the highway itself (Plff. Exh. No. 38).

Plaintiff testified, ''The road comes up to the track—it is a road all the way up to the track'' (61).

Defendant's witness, Brakeman Joseph Quinlan, testified, ''It is very hard to say just how he stepped, how much is dirt, because the road, it tapers off from macadam to dirt and it is more or less traveled on right close to the tie ends'' (304-305).

As defendant's driver Carlson left his employer's premises to the east and was traveling in a westerly direction on the north side of the highway, a cut of freight cars was being moved by plaintiff's train crew on this track.



The train movement was a back-up movement, that is, the engine was in reverse position backing from the east to west with three cars ahead of it and one or two cars behind it (51, 171, 250). The locomotive engineer was in his position on the right side of the cab next to the highway (87, 171).

Plaintiff, as this movement was being made, was riding on the side of the car immediately ahead of the engine and on the first step of the ladder at the end nearest the engine (52).

Plaintiff was required to be in this position. He testified, "My job was to work between the engineer and the crew, work between them" (52). And, "My duties [at that time were] to look for signals and after the cut of cars passed over the switch, to line the switch for the movement" (53). "I was required to look out for signals in case some should be passed from the rear end" (124). "It was my duty" "to pass signals to the engineer to stop the train after it had cleared the switch" (124).

Plaintiff was required, as the movement was being completed, to keep in sight of the engineer and control the movement by passing signals to the engineer. In order to do this he was required to drop off the moving cut of cars and take a position upon the highway.

Engineer Edwards, testified, "The man following the engine is usually supposed to keep in sight of the engine during the movement" (209). And, "The man following the engine usually tries to keep in sight of the engineer at all times" (210). And, "Will you state whether or not it was also the custom and practice of the head brakeman to be in your view at all times? A. The head

brakeman tries to keep in view of the engineer at all times'' (219-220).

Engineer Edwards testified, ''Mr. Edwards, will you state whether or not, based upon your experience and the rules of the company, the position taken by Mr. Bellamy immediately prior to the accident, while he was giving you this continuous signal, was a proper position? A. It was'' (205).

Plaintiff's witness, George P. Lechner, the conductor, testified, ''Mr. Lechner, based on your 14 years' experience as a railroad man, based on the rules of the company, based on the custom and practice, under the circumstances and movements involved at the time of the accident, state whether or not you, as head brakeman, would have dropped off the train in the vicinity of the frog and taken a position in the highway where you could see the engineer and the men at the rear of the cut and pass signals? * * * A. Well, yes'' (258-259).

Plaintiff, as the train cleared the switch, dropped off of the moving cut of cars onto the ground approximately at the point marked B-1 on the plat (53). Plaintiff testified, ''I dropped off the car and was facing the engineer, I went over into the highway, I had been there only a short while when I was struck down by the car, whatever hit me'' (55). And again, ''Could you give your best estimate as to how far away you were from the side of the train at the time you were struck? A. Approximately six, seven feet—six, seven, eight feet, six feet'' (55).

Engineer Frank G. Edwards testified, ''Will you state whether or not he [plaintiff] left the car in the regular manner? A. Yes'' (173).

Plaintiff, after stepping out into the road, was in the act of giving the engineer a continuous back-up signal. Frank G. Edwards testified, "Did you see what he did after he left the car? Mr. Bellamy? A. Stepped out into the road and giving me signals with his hand outstretched, his arms outstretched (indicating)" (174). Testifying further, "Will you tell us what that signal was? A. It is a back-up signal. Q. Will you stand and demonstrate how that signal was given? A. This way here (indicating). He was facing the engine, so he would give a signal like this to back away from the position in which he was standing. Q. Was that a continuous signal or otherwise? A. It was a continuous signal. Q. At the time Mr. Bellamy was giving you this continuous signal, who, if anyone, was in charge of the movement of the train? A. He was" (202).

It was in this situation that defendant's driver Carlson, rounding the curve from the east toward the west, came upon the plaintiff and ran him down.

The physical facts which the jury was entitled to consider show that Carlson was more than 1,000 feet from plaintiff when he rounded the curve.

The lowest speed of the train, as plaintiff was keeping up with it after dropping off, given in the evidence, was 2 miles per hour.

The plaintiff testified, "As the car was moving, about how fast was it going, Mr. Bellamy? A. Just a very slow rate of speed; it would be hard to estimate. Q. Can you give us an estimate? A. Oh, two, three, four miles —from two to—two or three miles an hour" (93).

Plaintiff kept pace with the train. He testified "I was moving approximately the same distance the train was moving, so I wasn't very far from the engine, to what I had been riding on that box car" (112).

The highest number of steps taken by plaintiff from the time he dropped off to the time he was struck was 20 steps of approximately 3 feet a stride. He testified, "15, 20 steps; it would be hard to judge how many steps I did take. Q. And your stride is about three feet a stride, is it, running or walking? A. Hardly that far, I guess. In the neighborhood of three feet, yes, sir. Hardly so far" (112).

At the 2 miles per hour, which the train and plaintiff were moving, plaintiff traveled 3 feet per second. Twenty steps at 3 feet each equals 60 feet. Sixty feet divided by 3 feet per second gives 20 seconds which plaintiff used in traveling the 60 feet.

The highest speed of the truck was 35 miles per hour. George P. Lechner testified, "Did you estimate its speed? * * * I would say between 30 and 35 miles an hour" (234). At 35 miles per hour, the truck was moving 51-plus feet per second. Twenty seconds, the time used by plaintiff in taking the 20 steps, times 51-plus feet per second equals 1,020 feet, the distance the truck traveled while plaintiff was traveling the 20 steps.

Making due allowance for the fact, though the jury could use its own judgment in the matter, for the approximate character of both, and reducing the mathematical results by 50 per cent, the speed of movement of plaintiff and the truck, as well as the number of steps taken, still leaves plaintiff walking forward on the high-

way while the truck driver, with plaintiff in his unobstructed view, was traveling a distance of over 500 feet.

Carlson knew, and had known for more than eighteen years, that train movements of this kind would be made at that hour of the day, in the manner and in the circumstances of this one. He knew, and had known, that plaintiff, or trainmen with similar duties, was required to ride the cut of cars, to descend therefrom to the roadway and give signals to the engineer just as plaintiff did.

Carlson testified that for more than eighteen years he had been employed at the same plant of this defendant at Redwood City Harbor (333). And, "So during this 18 years you have traveled back and forth over the same highway many, many times to and from work, at least every day or many times a day over that whole period, is that correct? Yes, that's right" (334).

And:

> "You were also, Mr. Carlson, familiar with the fact that the railroad tracks ran alongside of this highway as is described on the diagram and shown in the pictures, particularly calling your attention to plaintiff's exhibit No. 31?
>
> A. Yes, I am familiar with the highway.
>
> Q. And you are familiar with the fact that it runs right alongside the railroad track?
>
> A. Absolutely.
>
> Q. And you are also familiar with the fact that around 5:00, or at least that particular time every night the railroad men are switching boxcars on this particular track in the evening; that is the customary thing for them to be doing at this particular time of night, isn't that true, Mr. Carlson?

A. Well, not always, no.

Q. But you knew that they did?

A. More or less, some place on the line between that time and the time they go home.

Q. So you knew that these men were working in and about the highway at the particular time of this accident; isn't that a fact?

A. Yes.

Q. And you also stated that as you were coming around the curve you saw two men that were connected with this railroad movement drop off and cross over the track?

A. I did.

Q. So it was no surprise to you in any way when you found men working in and about the highway; isn't that a fact?

A. That is right'' (335).

Moreover, Carlson actually saw plaintiff hanging on the box car as he drove around the curve. He testified:

''Now, Mr. Carlson, approximately how far away from Mr. Bellamy were you when you first actually observed him?

A. Just as I came around the curve I could see him hanging on the car.

Q. You could see him hanging on the boxcar as you were back here around the curve?

A. As I was coming around the curve, if you keep your eye on it continuously—more or less I was looking toward him, I could see him.

Q. You watched him, followed him, kept him in your line of vision from the time you first observed him coming around the curve until the time of the accident, is that correct?

A. Yes'' (336).

Carlson, from the time he rounded the curve, maintained uniformly his position in the highway and did not change course. He testified, "When you stopped your car, from the time you felt this bump until you stopped it, did you keep in the center of the highway or did you bring your car over to the right or left? A. Oh, I kept in the same direction, the same" (329). And again, "Mr. Carlson, you stated on direct examination that you kept close to the center of the highway from the first time you came around the curve and continued on the center line all the way and never changed your course, is that correct? A. That is right" (339).

The jury, on the other hand, could have found that Carlson, despite his knowledge over many years of the train movements and the fact that trainmen would be in and about the highway and of his actual notice that this particular movement was being made and that men were in the highway, nevertheless ran plaintiff down without exercising any precautions whatsoever for his safety. It was stipulated that he had testified by deposition, "And when did you first see Mr. Bellamy? A. Well, I first seen him when I got practically to him, I seen him hanging on to the box car. Q. And then what happened? A. Well, I kept on; I pulled out towards the center of the road to get more room, not knowing what he was going to do" (339-340).

Engineer Edwards testified, "It [the truck] swerved toward the center. The driver swerved toward the center when he saw Mr. Bellamy" (175) ("When he saw Mr. Bellamy" was stricken as a conclusion). And, "The point I am getting at, Mr. Edwards, is, how far was the truck from Mr. Bellamy at the time that it began to swerve?

A. Oh, a distance of about 20 feet. Q. What happened next? A. Oh, the rear end struck Mr. Bellamy in the back and tossed him into the road between the cars and the truck itself'' (176).

Conductor Lechner testified that following the accident he had a conversation with Carlson as follows:

> ''Then after I gave him the information, I said to Mr. Carlson, I said, 'I didn't see the accident. How did it happen?' And he said, 'Well, I'll be damned if I know. First I know the man was right in front of me, and I tried to miss him, but I guess I didn't. * * *
>
> State whether or not at that time and place he said to you, 'I know you work there every day'? Did he state that?
>
> A. Yes, he said—well, I think I said that to him, I said, 'You know we work around there all the time, don't you?' He said, 'Yes, I see you working there every day' '' (344-345).

The jury could also have found that Carlson had in the past on many occasions driven negligently around the places where the railroad trainmen were switching box cars and in the highway. He testified, ''Isn't it a fact, Mr. Carlson, that in particular one conductor by the name of C. D. Moore warned you many times about the way you drove around the spots where the men were switching box cars and in the highway? * * * A. I don't remember'' (342).

The jury could have accepted either of Carlson's versions if it saw fit. It could have rejected them both. It could have found that Carlson's testimony wherever it disputed plaintiff was carefully tailored to meet what it

regarded as the necessities of the defense. It could have found that Carlson's story that, though he saw plaintiff on the side of the box car and about to descend upon the roadway, he kept plaintiff constantly in view, but did not know that he had struck plaintiff down until "I felt a bump, and I came to an immediate stop" (329) to be completely fantastic.

The jury could have found that Carlson was driving at an excessive rate of speed when he ran plaintiff down.

Conductor Lechner testified, "Did anything pass your range of vision as you were looking at Mr. Husson and the cars? A. Well, this pickup truck came between my range of vision and the cars. Q. Did you estimate its speed? * * * I would say between 30 and 35 miles an hour?" (234).

Engineer Edwards testified, "Is it your opinion that this truck was moving at excessive speed? A. For the condition of everything there, I think he was" (198).

Carlson gave no warning. Plaintiff testified, "Now, Mr. Bellamy, did you have any warning that you were about to be struck before you were struck? A. No sir" (55-56).

Engineer Edwards testified, "Did you hear any sound of any horn from the truck before the collision? A. None whatsoever. Q. Did you hear any other warning of any type? A. No" (176).

The jury was entitled to find that Carlson did not apply his brakes until after he struck plaintiff. He left skid-marks 30 feet in length. Engineer Edwards testified "Did you see whether or not the brakes were applied on

the truck? A. Yes. Q. At what point were the brakes applied, or when? A. After Mr. Bellamy had been struck, there were skidmarks on the road. Q. About how long were the skidmarks? A. About 30 feet'' (176).

It could have found that Carlson was late with the mail and was in a hurry to get it to the postoffice. Carlson testified, ''Now, at the time you left your plant was your mail ready for you at the usual time, or was it late? A. No, it was late that evening. It should be ready at 5:00 o'clock, but this night it was late'' (331).

Engineer Edwards testified, ''Did you go up to him? A. He spoke to me, said that he was in a hurry to get to the post office with the mail'' (177).

Plaintiff was seriously and permanently injured. This was undisputed (145-169).

Dr. Leonard Barnard testified, ''I came to the conclusion that this man had, first, suffered a comminuted fracture of his left collarbone; that he had been fractured at the sixth, seventh and eighth ribs in the left chest; that he had suffered a severe laceration with some tissue loss from the left lower arm'' (152).

The injuries sustained in themselves show that plaintiff was struck with terrific force and that he was struck not as claimed by defendant's driver Carlson by the rear fender, but by the front end of the truck body. Dr. Barnard testified, ''With reference to the complaints in his upper back and neck, I felt they were justifiable on the basis of his shoulder fracture and secondary strain to the muscle structures. By that I mean the mechanism of trauma, being struck hard enough on the shoulder to

fracture the collarbone and the ribs. The back, I felt, must have sustained some injury as well'' (153).

Plaintiff's Exhibits Nos. 8 to 12, incl., photographs of plaintiff's injured arm, show a deep laceration of the flesh of the arm and Plaintiff's Exhibit No. 40, a photograph of defendant's truck, shows that the blow was inflicted by a sharp and penetrating, rather than a rounded, object.

The jury could have found that plaintiff was in the exercise of due care.

Plaintiff, on dropping from the freight car onto the highway, moved forward in the direction of movement of the train, that is, from east to west. He did not ''back against the current of traffic.''

Plaintiff testified that he ''Left the car and stepped over in the highway and was moving toward the switch'' (54).

Engineer Edwards testified, ''And he was backing up, wasn't he? A. He was sort of sidestepping toward the center of the road. Q. Wasn't he moving backward against the flow of traffic? A. More sidestepping. Q. Wasn't he backing against the current of traffic and backing into the road? A. No, he was more sidestepping'' (188).

Defendant's witness, Brakeman Joseph Quinlan, testified, ''And did he take that in a backward movement? A. In a swinging movement; he wasn't walking backwards'' (303).

The jury had the right to find that plaintiff was walking forward giving continuous back-up signals to the

engineer. He was not running. Plaintiff, though counsel succeeded in having him characterize his movements as "running-walking steps" and a "running motion" (98), also testified, "And you walked, did you, upon the point where you got off in a diagonal direction out into the highway? A. Yes, sir" (94). And plaintiff testified:

"Q. Now as an army man, you know that a marching step is at about four miles an hour?

A. I don't know exact.

Q. Is that about right?

A. Yes, sir, I have an idea that would be somewhere near right.

Q. And you were going faster than that, weren't you?

A. Not very much faster than that" (113).

Engineer Edwards testified, "Stepped out into the road and giving me signals with his hand outstretched, his arms outstretched (indicating)" (174). And, "At the time Mr. Bellamy was giving you a continuous back-up signal, were you receiving signals from anyone else? A. He was the only one that my attention was directly upon" (207).

Plaintiff was into the highway five to seven feet. He was not near the center line. Plaintiff testified, "Could you give your best estimate as to how far away you were from the side of the train at the time you were struck? A. Approximately six, seven feet—six, seven, eight feet, six feet" (55). And, "Can you tell us about how far into the highway you were at the time you were struck? A. It would be hard to say; approximately—— Q. Well, have you any way—— The Court. Let him finish his answer. Mr. Phelps. I am sorry; go ahead. A. Six or seven feet; from five to seven feet. Q. And can you

say with reference to the center line of the highway? A. No, sir, I wasn't near the center line'' (99).

The jury could have found that plaintiff was the man in charge of the movement of this cut of freight cars. It could have found that plaintiff exercised, consistent with his duties as a railroad trainman, every possible precaution before he dropped off from the moving cut to the highway. Before dropping off he looked both east and west. When he looked east he saw as far as the curve of the track and the highway would permit and also to the point where the other trainmen were stationed on the highway.

Engineer Edwards testified, ''It was a continuous signal. Q. At the time Mr. Bellamy was giving you this continuous signal, who, if anyone, was in charge of the movement of the train? A. He was'' (202).

Plaintiff testified:

> ''Now, Mr. Bellamy, after you dropped off the train—well, first, before you dropped off the train, did you look in any direction?
>
> A. Yes, sir.
>
> Q. Which directions did you look?
>
> A. I looked facing the crew—I was facing the crew, and coming out and I was looking toward the east.
>
> Q. You were looking toward the east and then what happened?
>
> A. Left the car and stepped over in the highway and was moving toward the switch'' (54).

And, ''I was facing the train crew just as I stepped off the car onto the ground I turned towards the road, the highway and facing the engineer'' (91). Plaintiff testi-

fied, "And you rode in that position not looking at the box car itself but looking toward the shed where you had picked up the baby load? A. Yes, sir, I was in a position where I could turn my head to look in either direction. Q. Which way were you looking? A. I had been—well, I had faced each way; I had been looking in each direction coming out" (106). And, "A. Yes, sir; that is the reason I left the boxcar. Q. All right. And after you got off the boxcar, you didn't look back to see whether he was in your view when you stood at B-1, did you? A. I looked in that direction [east] when I left the car" (136). And:

> "Q. And you were not extending your gaze away from the train, then; you were keeping it on the trainman, is that right?
>
> A. I was keeping it on the trainman and on the highway.
>
> Q. Well, if you were keeping it on the highway, how far on the highway did you keep it?
>
> A. Well, I could keep it just as far as I could see, because after you head in that direction you can easily see a man on the car and the highway, just as far back as you can see, as the curve will permit" (137).

The jury could also have found that after plaintiff dropped from the moving cut of cars to the highway his duties as a trainman were even more stringent to safeguard the movement and the train and the lives and limbs of the train crew and of the public. It could have found that he was required to constantly and he did keep his eyes upon the engineer and give the continuous signals as the train proceeded, being prepared to instantly stop

the train by signal to the engineer if the safety of either required it. It could have found that he would have been remiss in allowing the movement to proceed while turning his back upon it to further look to the east for defendant's approaching truck.

Engineer Edwards testified, "Well, with the movement, we had two cars to the rear of the engine and it was necessary for somebody to be in view at all times to see that these cars didn't hit any obstruction on the track behind us while we were backing up" (206). And, "At the time Mr. Bellamy was giving you a continuous back-up signal, were you receiving signals from anyone else? A. He was the only one that my attention was directly upon" (207). And, "Will you state whether or not it was also the custom and practice of the head brakeman to be in your view at all times? A. The head brakeman tries to keep in view of the engineer at all times" (219-220).

Conductor Lechner testified: "When you are switching, in switching movements or any movement, the brakeman is the eyes for the engineer. That is, they have to so distribute themselves so that they can convey signs to the engineer" (236). And:

> "Suppose a child ran out on that track on the west end, 10 or 15 yards from where that car was moving, and you were on the road where you were and he was where he was; whose duty would it be to signal the train to stop? A. My duty.
>
> Q. Your duty? A. I was across the highway where I could see the movement in both directions.
>
> Q. Let's assume that he didn't know where you were.
>
> A. Then it would be his [plaintiff's] duty" (238-239).

II. ARGUMENT.

THE WORKMEN-IN-THE-STREET RULE APPLIED TO PLAINTIFF. DEFENDANT WAS GUILTY OF NEGLIGENCE, AND PLAINTIFF WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

We shall, before discussing the points of argument presented by appellant in the order of presentation in its brief, establish that the plaintiff was a workman in the street and that under the rule applicable to him as such the defendant was guilty of negligence and plaintiff was not guilty of contributory negligence.

The appellant, in its "Statement of Facts" has completely ignored this subject. Nor has appellant in its brief attempted upon the record to even discuss it. Appellant contents itself with a mere reference thereto in connection with its claims that the court erred in its instructions on the subject.

The evidence establishing that plaintiff was a workman in the street and the rule of law applicable to him as such is, wholly aside from any other point in the case, decisive of this appeal.

We have heretofore shown that plaintiff was a member of a train crew moving a cut of freight cars from east to west on a track paralleled by a roadway upon which the defendant's driver was traveling in the same direction.

We have shown that plaintiff, in pursuance of his duties was required to ride the side of one of the cars in the moving cut, that he was the eyes of the engineer, that he was in charge of the movement, and that he alone could give the signals controlling its movement.

We have shown that as the movement was being completed, and in order to keep in sight of the engineer plain-

tiff was required to drop off the moving cut of cars and take the position upon the highway. We have shown that the plaintiff dropped off the freight car and, in order to keep the engineer in sight and in order to protect the movement, he dropped off the car and went into the highway a distance of approximately 6 feet; that while he was in the roadway giving the engineer a continuous back-up signal with his arms outstretched and facing the engine, as he was required to do, he was struck from behind and run down by defendant's truck.

We have shown that defendant's driver Carlson was more than 1,000 feet from plaintiff when he rounded the curve, during all of which distance his view was unobstructed. We have shown that while defendant's driver was traveling this more than 1,000 feet, plaintiff was moving forward approximately 20 steps at 2 miles per hour.

We have shown that although defendant's driver knew and had known for more than 18 years that train movements of this kind would be made at that hour of the day in the manner and in the circumstances of this one, and that he knew and had known that trainmen with similar duties were required to ride the cut of cars and to descend therefrom to the roadway and give signals to the engineer just as plaintiff did, defendant's driver, either seeing him in the roadway before him or not looking at all, negligently ran him down.

We have shown that defendant's driver was driving at an excessive rate of speed—35 miles an hour—without giving any warning whatsoever, and that he left skidmarks 30 feet in length.

We have shown that the plaintiff was in the exercise of due care; that he did not "back against the current of traffic," as claimed by appellant, but on the contrary was walking forward in the act of giving continuous back-up signals to the engineer. We have shown that he was walking and not running. We have shown that he was not near the center line of the highway, and that he was approximately 6 feet from the side of the train when he was struck.

We have shown that before dropping off, plaintiff looked toward both the east and the west; that when he looked east he could see as far as the curve in the highway would permit. We have shown that as he stepped from the car to the ground he was looking toward the east. We have shown that the plaintiff was required to safeguard the movement and the lives and limbs of the train crew and of the public by constantly keeping his eyes on the engineer to the west and giving the continuous signals as the train proceeded, and that he would have been remiss in allowing the movement to proceed while turning his back upon it to further look to the east for defendant's approaching truck.

It has long been settled law that under these facts plaintiff was a workman in the street and entitled to the benefit of the rules of law pertaining to such. The courts of California, over a period of many years and without a single exception, have so uniformly held.

The case of *Amore v. Di Resta* (1932) 125 Cal. App. 410, 13 P. 2d 986, is squarely in point and decisive. Joe Amore, the decedent, was employed by the Market Street Railway Company as a member of one of its over-

head line crews. He was a "ground man" charged with the duty of remaining on the ground to pass up materials to those working aloft, and to divert traffic away from the large tower-truck which was used by the crew in working on the overhead lines.

The defendant ran the deceased down in broad daylight.

He drove at a rate of speed of 30 to 40 miles per hour, "although the speed was slightly decreased upon approaching the truck" (p. 987).

Defendant testified that he did not see Amore or the tower-truck until he had struck Amore. He claimed his view was obstructed.

Overruling defendant's contention that he was not liable, the court said (p. 987):

> "On the contrary, we are of the opinion that the only rational conclusion which the jury could have reached was that the death of the deceased was proximately caused by the negligence of appellant and without fault on the part of the deceased."

The action of the trial court, in granting plaintiff a new trial for inadequacy of the verdict and "in limiting a new trial to the issue of damage alone," was affirmed.

In *Jones v. Hedges* (1932) 123 Cal. App. 742, 12 P. 2d 111, plaintiff's decedent, Jones, while working as a paving employee on a highway, was killed when he was struck by an automobile driven by the defendant. Jones at the time was following a truck near the edge of the shoulder of the road. Defendant claimed that her view was obscured by smoke generated by the release of hot oil in carrying on the work. Speaking of the status of Jones, the Court said (p. 115):

"It must be remembered, however, that Jones was one of the crew engaged in work on the highway, and had orders from his foreman to proceed to a position on the roadside and keep traffic off the apron. The measure of his duty to exercise care in his own behalf was therefore quite different from that of the ordinary pedestrian using the roadway merely for travel. The standpoint from which his conduct is to be viewed is that of a laborer whose duties required him to station himself on the highway as directed; and he was justified in assuming that operators of motor vehicles would use reasonable care and caution commensurate with visible conditions, and would approach with their cars under reasonable control."

In *State Compensation Ins. Fund v. Scamell* (1925) 73 Cal. App. 285, 238 Pac. 780, McNulty, a street sweeper, at night, was run down by an automobile. McNulty was at a point about 6½ feet from the gutter, "At this moment he was struck from the rear by defendant's automobile and rendered unconscious" (p. 781).

Of the status of McNulty, the Court said (pp. 781-782):

"Much less so is a laborer whose duties require him to be in the street in the performance of his occupation. Pedestrians are not continuously in the street, and their attention is devoted to a safe passage, while the attention of a street laborer must be to a considerable extent devoted to his task. There can be and there is no duty imposed on a workman to be constantly on the lookout for motor vehicles; on the contrary, it is the duty of drivers of vehicles to observe the street laborers and to avoid contact with them. It is not negligence as a matter of law for a workman to keep his mind on his work or to fail to look and listen for approaching vehicles. He may properly

assume that the automobilist will not be guilty of negligence in running him down without warning (King v. Green, 7 Cal. App. 473, 94 P. 777), and especially is this true where he remains within a space established for the parking of cars (Medlin v. Spazier, 23 Cal. App. 242, 137 P. 1078).

One so employed may also assume that a driver will give a signal or warning so that an accident may be avoided. Regan v. Los Angeles Ice Storage Co., 46 Cal. App. 513, 189 P. 474.

A man who is engaged in work upon the streets cannot, if he performs his duty, spend a large part, if not all, of his time looking for the approach of vehicles. In most streets, if he did so, he would accomplish little or nothing."

In *Zumwalt v. E. H. Tryon, Inc.* (1932) 126 Cal. App. 583, 14 P. 2d 912, plaintiff, a sheep herder, was run down by defendant's driver, in daylight, when he was trying to chase a lamb from the highway. Defendant tried to invoke California Vehicle Act, Section 150½, now Vehicle Code, Section 564, reading:

"Pedestrian to Walk on Left Side of Roadway.

No pedestrian shall walk upon any roadway outside of a business or residence district otherwise than close to his left hand edge of the roadway. (Enacted 1935.)"

Holding that plaintiff was not a traveler upon the highway and did not come within the provisions of this statute, the court said (p. 914):

"We are not inclined to take the view that respondent was a pedestrian on said highway, at the time of the accident, within the meaning of said section 150½.

> Respondent was not a traveler upon the highway, but was there as a herder in the performance of his duties as such. Laborers, whose duties require that they work in the streets, are not considered in the same light as pedestrians. Ceola v. 44 Cigar Co., 253 Pa. 623, 98 A. 775. In the case of such persons the degree of care is different from that of a traveler, whose whole attention is directed to protecting his own safety."

In *Woods v. Wisdom* (1933) 133 Cal. App. 694, 24 P. 2d 863, plaintiff was working on a highway operating a grader. One of his duties was clearing the highway of loose stones. He jumped from the grader and proceeded across the highway to remove them.

It was a clear day.

The defendant driver, nevertheless, ran him down. The court said (p. 864):

> "It seems clear, under the circumstances, that if the defendant had been observing the road ahead and had used even the slightest degree of care he would not have driven his automobile into plaintiff and caused his injury."

It also said (p. 864):

> "It has been repeatedly held that a laborer, whose duties require him to be in a public street, is not required to be constantly on the lookout for approaching vehicles, since he should devote his time to the performance of his duties. Under such circumstances it is the duty of the driver of a motor vehicle to keep an alert watch for laborers on the street and avoid running them down. The laborer is entitled to keep his mind on his work, and it is not negligence as a

matter of law for him to fail to continually look and listen for approaching vehicles. * * * Under such circumstances the contributory negligence of the laborer is a matter of fact to be determined by the jury. King v. Green, 7 Cal. App. 473, 94 P. 777. The jury having found the plaintiff free from contributory negligence and the defendant guilty of negligence which proximately caused the injury, we cannot disturb the judgment on appeal."

It further said (p. 864):

"The evidence discloses that defendant ran down a workman, who was in plain view, working on the street, without sounding any warning of his approach and while there were unoccupied portions of the street over which he might have driven if he had changed the direction of his car slightly and thereby have avoided the accident. We have concluded that under these circumstances the motorist who fails to change the direction of his car should give timely warning of his approach by sounding his horn and thus give the workman the lone chance of a jump for safety. It would seem that some warning should be given before a blow is struck by a dangerous agency such as a fast moving automobile. Common courtesy should require the warning, and the law should demand no less. Under similar circumstances evidence of the failure to give such warning has been held proper."

In *Mecham v. Crump* (1934) 137 Cal. App. 200, 30 P. 2d 568, plaintiff was engaged in overseeing and inspecting highway construction work. He was about 4 feet from the edge of the highway and was stooping over to get a key which had been thrown to him, but which lay on the highway. He was struck by defendant's automobile travel-

ing 40 to 45 miles per hour. Respecting the status of the plaintiff, the court said (pp. 569-570):

> "In the case now under consideration, respondent was not a pedestrian upon the highway, but was there in performance of his duties as foreman. Leventon, the contractor, testified that respondent's duties required of him to sometimes operate the equipment and sometimes to perform physical labor; in other words, his duties as foreman did not consist merely in standing back and directing others in the work that was being done, but as occasion demanded that he participate in whatever was necessary to be performed. Under these circumstances he is not to be considered in the same light as a pedestrian. * * * The question of negligence under such circumstances is one for the jury."

The court also said (p. 570):

> "Respondent had the right to assume that appellant Lillian Crump would not run him down, without warning, while he was engaged in the performance of his duties as foreman and particularly so as numerous warning signs were placed along the highway from the direction in which said appellant was traveling thereon."

The court further said (p. 570):

> "The fact that appellant Lillian Crump was traveling within the speed allowed by the California Vehicle Act does not exonerate her from negligence."

In *Scott v. City and County of San Francisco* (1949) 91 Cal. App. 2d 887, 206 P. 2d 45, plaintiff was employed by a roofing contractor as a member of a crew engaged in installing a roof on a building under construction. His par-

ticular duty was to tend a tar kettle. The tar kettle had been placed within 3 feet of the overhang of street cars. The plaintiff was "walking between the kettle and the track with his back to the oncoming street car" (p. 46), when he was struck by the street car. The court said (p. 47):

> "One whose duties require him to work in a public street is not held to the same quantum of care as a pedestrian. * * * Plaintiff testified that he looked to the south and saw nothing. The laborer in the street is required to use a lesser quantum of care than a pedestrian and even in the case of a pedestrian evidence that he looked in the direction from which danger might be expected and saw nothing ordinarily raises a jury question as to his contributory negligence."

Overruling defendant's contention that the rule as to street laborers should be limited, the court said (p. 47):

> "Respondents suggest that the rule with regard to the quantum of care required of workmen in public streets should be limited to those whose work has a direct relation to the streets, i.e., to street sweepers, trackmen, etc. The rule has not been so limited. In Zumwalt v. E. H. Tryon, Inc., 126 Cal. App. 583, 14 P. 2d 912, the rule was applied to a sheepherder driving his band of sheep along a public road, and in Ostertag v. Bethlehem, etc., Corp., supra; 65 Cal. App. 2d 795, at page 801, 151 P. 2d at page 650 the rule was applied to one working in the interior of a building under construction, * * *."

In each of the foregoing decisions, the court considered the alleged contributory negligence of plaintiff and either held, as it did in the *Amore* case, supra, that the work-

man was without fault, or that at most his contributory negligence was for the jury.

In none of the foregoing cases were the facts as conclusive in favor of the workman as here. In none of them were the duties of the workman such as to require his constant and unremitting attention to the performance of his work—a departure from which here could well have brought disaster to the train, the train crew, or the traveling public.

Certainly upon this record and the applicable law, the issues of negligence and contributory negligence were resolved by the jury's verdict and that verdict is here conclusive.

A. Appellant's contention that the evidence was insufficient as a matter of law to establish negligence on the part of defendant.

We have shown at considerable length in our statement of the case the facts which the jury was entitled to find by its verdict. Appellant's "Statement of Facts" is so far from the actuality as to present a wholly different case from that which was tried. Appellant does not even credit the record with, nor take into consideration, that which it itself by its witnesses admitted upon the trial.

Far from this record failing to show negligence on the part of the defendant, it conclusively establishes negligence as a matter of law. It does this even assuming plaintiff was a pedestrian and without benefit of the workmen-in-the-street rule.

Consistently and uniformly the appellate courts of the State of California have held that a motor vehicle driver

who runs down a person in broad daylight in front of him on the street or highway is guilty of negligence.

In *Quinn v. Rosenfeld* (1940) 15 Cal. 2d 486, 102 P. 2d 317, the case was tried to the court without a jury.

Plaintiff, a pedestrian, was crossing a San Francisco city street in the residential district at 6:35 P.M. at a point other than a cross-walk. The defendant testified that at no time did he see a man in the path of his car, but that he became aware of a shadow which he thought was a car backing out from the curb and that he swerved to his left to avoid it. Affirming plaintiff's judgment, the court said (p. 319):

> "By section 562(a) of the Vehicle Code the plaintiff was required to yield the right of way to all vehicles on the roadway. But by the provision of subdivision (b) of the same section the defendant was not thereby relieved from the duty of exercising due care. His duty did not arise only when he saw the plaintiff. It was a constant duty, and that duty would be breached if, under the circumstances, he failed to see what an ordinarily prudent person exercising due care would have seen. We cannot say that before proceeding the plaintiff should have waited for a vehicle to pass which was traveling at a relatively slow rate of speed and approaching from a distance of 135 to 150 feet, nor that his failure to do so necessarily constituted a violation of the statute. On the record here presented the question whether the plaintiff did all that a reasonable man was required to do in compliance with the statute, the questions of negligence, contributory negligence and of proximate cause, were for the court to determine."

In *Wiswell v. Shinners* (1941) 47 Cal. App. 2d 156, 117 P. 2d 677, plaintiff's decedent, a pedestrian, crossing the street at a point other than a cross-walk, was struck by defendant's automobile moving 25 to 30 miles per hour. The defendant testified "that there was nothing to obstruct his view of the street ahead of him and that he was at all times looking straight ahead: but when asked whether or not he saw the deceased at any time prior to the impact, the driver testified, 'It is blank to me. I don't recall. The only thing I recall is the impact'" (p. 679). The trial court directed a verdict against plaintiff.

Reversing the judgment, and remanding the case for a new trial, the court said (p. 681):

> "The evidence in the case before us points unerringly to the fact that the accident occurred in broad daylight with the weather clear and the view of the driver unobstructed from the time he passed through the intersection east of the one at which the fatality occurred. The aforesaid duty imposed upon the defendant by the provisions of the Vehicle Code would be breached if under the circumstances he failed to see, when an ordinarily prudent person, situated as he was and using due care, would have seen. The driver of a vehicle is not guilty of negligence under the circumstances here shown if he did those things which a reasonably prudent person would have done under similar circumstances. Neither was the decedent guilty of contributory negligence if, seeing what he saw and knowing what he knew, his behavior and conduct was the equal of that of an ordinarily and reasonably prudent person. And, it must be remembered that the law requires that a driver shall always maintain a vigilant watch for other persons and vehicles using the highway. Under the facts disclosed

in the instant case, the jury might have concluded that the driver of the automobile failed to perform his requisite duty and that such failure was the proximate cause of the fatal injuries sustained by the decedent."

In *Fuentes v. Ling* (1942) 21 Cal. 2d 59, 130 P. 2d 121, plaintiff, crossing the street in the middle of the block and at a point where there was no cross-walk, was struck by defendant's car.

"Defendant and his son, who was riding with him in the front seat, testified that they did not see plaintiff before the impact although they were both observing the highway. They, as well as other occupants of the automobile, estimated its speed as between 18 and 20 miles per hour. Witnesses for the plaintiff testified that the automobile was traveling at a rate of 40 to 45 miles per hour. Defendant brought his car to an almost immediate stop after the right front part of the car struck plaintiff" (p. 122).

Affirming plaintiff's judgment, the court said (p. 122):

"The evidence as to the negligence of defendant was conflicting. The ability of defendant to stop his automobile within five feet after the collision suggests the improbability of excessive speed, but even if the court accepted the defendant's version in that regard it might have concluded that defendant was negligent in not observing plaintiff on a well lighted street."

In *Jacoby v. Johnson* (1948) 84 Cal. App. 2d 271, 190 P. 2d 243, plaintiff, a pedestrian, was struck by defendant's automobile while crossing the street in the middle of the block and at a point where there was no marked cross-walk. "It was a custom well known to appellant

that patrons of the market crossed the street at the point of the accident in going to and from the market on the westerly side of the street'' (pp. 244-245).

Affirming plaintiff's judgment holding that the issues of negligence and contributory negligence were for the trier of facts, the court further said (p. 245):

> ''The duty imposed upon appellant by section 562(b) of the Vehicle Code, to exercise due care for the safety of pedestrians upon the highway, is emphasized by his evidence, to which we have referred, that he well knew that it was the custom of patrons of the market to cross the street near the middle of the block where the accident took place.''

In *Huetter v. Andrews* (1949) 91 Cal. App. 2d 142, 204 P. 2d 655, plaintiff, a passenger in an automobile, was injured when the driver seeing defendant's car approaching 850 feet away, proceeded in low gear across the highway to pass over a paved cross-over between the divided lanes. Defendant's automobile struck the left side of the Huetter car at a speed of 40 to 50 miles an hour.

The day was clear and dry. After defendant drove the said distance of 850 feet there were no cars or other objects of any kind which obstructed his view.

Although defendant was looking straight ahead the entire time, defendant did not see the Huetter car until he was 75 to 100 feet away from him.

The jury returned a verdict in favor of defendants.

Reversing the judgment and remanding the case for trial on the issue of damages only, the court, in part, said (p. 658):

> "That appellant's 'claim' as above recited is supported by the evidence there can be no question. And that such conduct amounts to negligence as a matter of law is well supported by the authorities. In the circumstances revealed by the record one who does not see that which is clearly visible and would have been seen by one exercising ordinary care, as result of which a collision occurs, is guilty of negligence as a matter of law."

Manifestly, upon the record here, defendant's negligence, through its truck driver, was at least an issue of fact for the jury.

B. Appellant's contention plaintiff was guilty of contributory negligence as a matter of law.

The whole predicate of defendant's contention that plaintiff was guilty of contributory negligence as a matter of law is based upon a completely mistaken and unfounded view as to the record in the case.

We have shown at some length in our Statement of the Case that plaintiff conducted himself with due care and that at the most his contributory negligence was a question of fact for the jury. We have affirmatively shown that the statements made in appellant's argument under this head, that plaintiff "ran into the stream of traffic on the highway", that "he did not look in the direction of approaching traffic," that "he dashed out into the highway," "with his back to oncoming traffic" are completely without foundation, in the teeth of the facts which the jury was entitled to find, and founded upon mere assertion.

It will suffice, we think, without repeating what has already been said, at this point to demonstrate the wholly gratuitous character of the assertions made.

Appellant, at first states that plaintiff did not look, and later broadens the statement to say that looking "a few moments" "before dashing out into the highway" cannot be claimed to have fulfilled his duty to look again.

The fact is that plaintiff was looking toward the east in the very act of dropping from the car to the highway. He testified:

> "Mr. Bellamy, before you got off the boxcar, didn't you turn around so that you were then facing the engineer—and this is while you were still on the ladder?
>
> A. No, sir. Could I kind of explain that?
>
> Q. Well, if you can, I want you to, certainly, but first, can you answer that question one way or the other and then explain all you want?
>
> A. I was facing the crew when I let loose of the ladder, just about the time I was supposed to let loose of the ladder and light on the ground" (90).

And, "All right. And after you got off the boxcar, you didn't look back to see whether he was in your view when you stood at B-1, did you? A. I looked in that direction when I left the car" (136).

Upon the erroneous assumption that plaintiff did not look, appellant proceeds to cite, upon a wholly erroneous state of facts, what is claimed to be applicable and controlling law.

In *Mundy v. Marshall* (1937) 8 Cal. 2d 294, 65 P. 2d 65, the pedestrian was drunk, "he looked straight ahead

and neither to the right or left as he left the curb'' (p. 66).

In *Pearl v. Kaline* (1947) 82 Cal. App. 2d 910, 188 P. 2d 58, a pedestrian case, *Mundy v. Marshall* was distinguished and the trial court's order granting a new trial after verdict for defendant was affirmed.

In *Cortopassi v. California-Western R.R. & Nav. Co.* (1940) 39 Cal. App. 2d 280, 102 P. 2d 1093, plaintiff's decedent was killed when struck by a gasoline railroad locomotive. The trial court had granted defendant's motion for nonsuit. The court reversed, holding plaintiff's decedent's contributory negligence for the jury and *Mundy v. Marshall,* supra, was again distinguished.

Appellant next cites *Chase v. Thomas* (1935) 7 Cal. App. 2d 440, 46 P. 2d 200, but from even appellant's recital of the facts ''plaintiff stepped from a place of safety, and without looking, had walked into the highway where defendant's vehicle struck him.''

The same court, in the later decision of *Jacoby v. Johnson* (1948) 84 Cal. App. 2d 271, 190 P. 2d 243, held the exact contrary, citing *Fuentes v. Ling* (1942) 21 Cal. 2d 59, 62, 130 P. 2d 121, and said (p. 245):

> ''The mere crossing of a street by a pedestrian in the middle of the block does not constitute contributory negligence that would preclude him from recovering damages if injured by an automobile. Fuentes and Tomey cases, supra.''

Appellant next cites *Deike v. East Bay St. Rys.* (1935) 7 Cal. App. 2d 544, 46 P. 2d 812, for the proposition that the duty of a pedestrian to look is ''a continuing duty and was not met by looking once and then looking away.''

In *Amendt v. Pacific Elec. Ry. Co.* (1941) 46 Cal. App. 2d 248, 115 P. 2d 588, even though it, like the *Deike* case, is a street car and not a motor vehicle case, the court distinguishes the *Deike* case and other cases cited by appellant and holds them inapplicable with the simple statement, "In each of them plaintiff used no caution."

In each of the remaining cases cited by appellant the undisputed evidence likewise showed that the pedestrian took "no precaution at all for his own safety," or that the "stop, look and listen rule" applicable to railroad crossings was applied.

In *Connolly v. Zaft* (1942) 55 Cal. App. 2d 383, 130 P. 2d 752, it was specifically held that the "stop, look and listen rule" does not apply to the pedestrian about to cross the street.

In *Toschi v. Christian* (1944) 24 Cal. 2d 354, 149 P. 2d 848, the former rigidity of the "stop, look and listen rule" is modified even in a railroad crossing accident case.

In *Southern Pacific Co. v. Souza* (9 Cir. 1950) 179 F. 2d 691, this court recognized it to be the law of California, that even a driver of an automobile is not, as a matter of law, required to look a second time in a railroad crossing accident. This court says (p. 693):

> "However, the more recent decisions of the courts of California, although they have not expressly overruled the old cases, show a definite policy trend away from the 'crystallized fact' cases and favor making the standard of care a question for the determination of the jury. Several California decisions have held on similar fact situations that whether or not the

driver's choice of a place to look and his failure to look a second time constituted negligence were questions of fact for the jury."

The true rule in California is that expressed by the Supreme Court of California in *Salomon v. Meyer* (1934) 1 Cal. 2d 11, 32 P. 2d 631, wherein the court specifically and categorically holds that the proposition of law contended for here by appellant, is erroneous.

In that case the pedestrian looked in the direction of the approaching vehicle as she stood on the curb. She did not thereafter, in proceeding across the highway, look again. There, as here, the defendant contended that such conduct constituted contributory negligence as a matter of law. Defendant succeeded in obtaining an instruction to the jury as follows (p. 632):

> " 'I instruct you that it is a duty resting upon any person attempting to cross a street that is likely to be dangerous, before placing himself or herself in a position of danger, to look in the direction from which such danger is to be anticipated. This is a continuing duty, and is not met by looking once and then looking away.' "

Holding the instruction to be an erroneous statement of law, and reversing the judgment in defendant's favor, the court said (p. 633):

> "The vice of the instruction here complained of lies in the unqualified statement that 'this is a continuing duty, and is not met by looking once and then looking away.' Whenever there is room for an honest difference of opinion between men of average intelligence, the question of whether the plaintiff was neg-

ligent in failing to look again in the direction from which the defendant's car was approaching is a question of fact for the jury and the finding of the triers of fact is conclusive. McQuigg v. Childs, 213 Cal. 661, 3 P. (2d) 309. Counsel for appellant have made calculations based upon the speed with which the plaintiff walked and the speed at which the defendant testified he was driving, the accuracy of which is not challenged by the respondent, and by which it is claimed to have been shown that the car was at least 132 feet away when the plaintiff saw it as she stood on the curb. Whether plaintiff's conduct thereafter in proceeding across the street in the crosswalk without again observing the approach of the defendant was consistent with ordinary care is a question to be determined from a consideration of all the facts and circumstances of time, place and conditions of traffic."

In *Goodwin v. Foley* (1946) 75 Cal. App. 2d 195, 170 P. 2d 503, a pedestrian case, the exact instruction given by the court in the *Salomon* case was again before the court. The jury had returned a verdict in favor of the defendant. The court, reversing the judgment, following *Salomon v. Meyer,* supra, holds that the giving of the instruction was reversible error.

In *Woods v. Eitze* (1949) 94 A.C.A. 979, 212 P. 2d 12, hearing denied 1950, a pedestrian was struck by defendant's automobile while crossing the roadway at a point other than at a cross-walk. There, as here, the defendant claimed that plaintiff was running, and the evidence showed that defendant swerved to avoid striking her, and left skid marks. The jury returned a verdict in favor of plaintiff for only $5,000. The trial court granted plain-

tiff's motion for new trial solely upon the issue of damages. Defendant appealed, contending that plaintiff was guilty of contributory negligence.

The court, affirming the trial court's order granting a new trial following the decision of the Supreme Court of California in *Fuentes v. Ling,* supra, said (pp. 15-16):

> "In the latter case the court held that the question of plaintiff's contributory negligence is for the trial court to determine and its findings when supported by the evidence will not be disturbed on appeal."

In *Cole v. Ridings* (1950) 95 A.C.A. 168, 212 P. 2d 597, a minor was crossing the roadway at a point other than a cross-walk at 4:30 in the afternoon of a dry, clear day, when she was struck by a motorcycle driven by defendant. The defendant claimed that the little girl "darted right out in front of the motorcycle * * * From behind the ice cream truck. * * * Running" (p. 599). The jury returned a verdict in favor of the defendant. Plaintiff appealed. The evidence showed that before crossing "Appellant looked in both directions" (p. 599). The court held that an instruction to the jury to the effect that Section 562(a) of the Vehicle Code required the pedestrian to yield the right of way and that it was a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting her before attempting to cross a street, was erroneous. The court said (p. 601):

> "These instructions emphasized the duty of appellant to yield the right of way and failed to inform the jury clearly that such duty was not absolute and that the real question was whether appellant exercised reasonable care under the circumstances."

It further said (p. 601):

> "It should be noted that there is some evidence of contributory negligence on the part of appellant, but it can hardly be said that the record shows contributory negligence as a matter of law; that was an issue of fact for the jury."

It is clear that the law of *Salomon v. Meyer,* supra, as reaffirmed in *Goodwin v. Foley,* supra, is firmly established as the law in California and that appellant's whole position is without basis and without merit.

C. Appellant's contention that the court erred in instructing the jury on the subject of workmen in the street.

Appellant here complains that the trial court erred when "it instructed the jury that appellee was entitled to the benefit of the rule." The trial court did no such thing.

The instruction, set out immediately following this claim by appellant, submits to the jury the issue of fact whether "plaintiff was required by his duties to be upon the highway" etc., and, if so, the rules governing his conduct.

As we have shown in our Statement of the Case, the record conclusively establishes that plaintiff was a workman in the street. Appellant gives lip-service to the rule governing workmen in the street, but it does not give credit to either the facts in this case nor to the law governing them.

Appellant again bases its position upon a misconception of what the case was about and nothing quite illustrates this better than the following admission taken from its brief at page 31, wherein appellant says, "Had

Bellamy already gained the center of the highway and been (perhaps) walking towards the west giving signals, etc. it might be argued that he would at such time be entitled to the benefit of the rule."

The fact is that plaintiff was walking toward the west, giving signals, etc., and, by appellant's above quoted concession, his whole contention is destroyed.

The assertion made by appellant in the quotation, however, is inexcusable. It is, we think, characteristic of appellant's presentation of both purported facts and law on this appeal.

We have pointed out, in perhaps too voluminous detail, the testimony conclusively establishing that plaintiff was a workman in the street. Our justification for treating the record so exhaustively in this, as well as in other respects, is the fact that the above statement is made without apology and without justification by the appellant, and that it is typical of like effort by appellant in other instances.

The fact is that Engineer Edwards testified, "Did you see what he did after he left the car? Mr. Bellamy? A. Stepped out into the road and giving me signals with his hand outstretched, his arms outstretched (indicating)" (174). Testifying further, "Will you tell us what that signal was? A. It is a back-up signal. Q. Will you stand and demonstrate how that signal was given? A. This way here (indicating). He was facing the engine, so he would give a signal like this to back away from the position in which he was standing. Q. Was that a continuous signal or otherwise? A. It was a continuous signal. Q. At the time Mr. Bellamy was giving you this

continuous signal, who, if anyone, was in charge of the movement of the train? A. He was'' (202).

We have likewise shown at considerable length that plaintiff, while giving this continuous signal was ''walking towards the west.'' It was not only proper to give this instruction, but it would have been error not to give it.

In support of its claim that the instruction should not have been given, appellant cites only the case of *Lewis v. Southern California Edison Company* (1931) 116 Cal. App. 44, 2 P. 2d 419. The *Lewis* case does not even remotely involve a state of facts comparable to those here, nor does it hold even on the state of facts there present that the plaintiff could not recover.

At page 31 appellant states, ''we submit that, as a matter of law, a workman who dashes from a place of safety into the path of an approaching danger, without looking, has not observed even a minimum standard of care.''

Appellant has misread the *Lewis* case.

The court there actually recognized that deceased's contributory negligence was for the jury. It said (p. 422):

> ''Upon the question as to whether deceased was guilty of contributory negligence, there was apparently some conflict in the evidence. This, however, was not sufficient to prevent the trial court from granting a new trial on the ground of the insufficiency of the evidence.''

In that case the plaintiff recovered a judgment, the trial court granted a new trial on all of the grounds in the notice of intention, and plaintiff appealed.

Plaintiff's decedent, a swamper on a garbage truck, stepped off the running-board of the truck in a space of not more than approximately 4 feet after deducting the distance of clearance of an automobile by defendant's automobile.

Plaintiff's sole witness was impeached by at least three witnesses. On the trial he altered and contradicted his evidence.

The appellate court, under the familiar rule, affirmed the trial court's granting of the new trial and observed *obiter,* "We believe such rules [the rules relating to the workmen in the street] do not apply if the workman, as in this case indicated, without notice, suddenly jumps from the left running board of the garbage truck in front of the approaching car" (p. 423). It is to be noted that this decision was rendered in 1931 and that it has never again been cited on the propositions contended for by the appellant.

In the *Lewis* case there was no evidence whatever that the defendant's driver had any notice that the deceased would descend from the truck, let alone jump from it in the circumstances outlined.

It is to be noted that there the deceased jumped from the truck, not at the curb line but at the center line of the highway, in a space of approximately 4 feet.

There was in that case no evidence that it was the duty of the deceased to descend at the point he did.

Far from holding that the defendant was guilty of no negligence, or that plaintiff's decedent was guilty of contributory negligence as a matter of law, the decision of the court left the case open for a new trial.

If appellant is correct in its claim that the workmen-in-the-street rule did not apply in the circumstances here, then each of the courts was wrong in the many decisions reviewed by us holding that the rule was applicable. In none of those cases was there any evidence that the duties of the workman prevented his taking additional precautions. Here the evidence was undisputed that plaintiff, prior to and including the very moment he was struck, was actually engaged in the duties of directing the movement of a live and moving train and that these duties precluded him from dropping them and hazarding the lives and limbs of the trainmen and the traveling public as well. If the rule was applicable in those cases, it was doubly so here. Indeed, what appellant was really contending for was the emasculation of the workmen-in-the-street rule, and if its contention is adopted here, the very essence of that doctrine is obliterated from the law. The predicate of the rule is not that the workman could not, in the particular circumstances, have taken time out to look for approaching vehicles, but that, because he is a workman and his attention, as stated in *State Compensation Ins. Fund v. Scamell,* supra, "*must be to a considerable extent devoted to his task*" (pp. 781-782) (italics ours), "He may properly assume that the automobilist will not be guilty of negligence in running him down without warning" (p. 782). Here the plaintiff was not only a workman in the street, but the transcendent importance of what he was doing at the time prevented his taking time out to further watch for the approach of defendant's truck.

D. Appellant's claim of error in the refusal of appellant's proposed instruction that the workmen-in-the-street rule had no application "if the jury should find that appellee 'suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle' ".

At page 33 of appellant's brief it makes the wholly gratuitous assertion in support of its claim of error "(and the evidence [Tr. 97-99] was without conflict on the point) that Bellamy 'suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle.' "

The quick answer is that there was no such evidence in the case.

To the contrary we have shown in our Statement of the Case that defendant's driver Carlson knew and had known for more than 18 years that train movements of this kind would be made at the hour of the day, in the manner and in the circumstances of this one. He knew and had known that plaintiff and trainmen with similar duties were required to ride the cut of cars and descend from the car to the roadway and give signals just as plaintiff did.

More specifically, Carlson himself testified on cross-examination, "So you knew that these men were working in and about the highway at the particular time of this accident; isn't that a fact? A. Yes. Q. And you also stated that as you were coming around the curve you saw two men that were connected with this railroad movement drop off and cross over the track? A. I did. Q. So it was no surprise to you in any way when you found men working in and about the highway; isn't that a fact? A. That is right" (335).

Furthermore, the undisputed evidence shows that plaintiff whether while on the freight car, descending therefrom, or upon the highway was in the pursuance of his duties.

We have already shown that the only case cited by appellant, in support of the requested instruction, *Lewis v. Southern California Edison Company,* supra, has no application to the facts of this case.

Lastly, we are at a loss to understand wherein appellant has any complaint. The court actually placed upon the plaintiff in the instruction it did give, and made the subject of plaintiff's claim of error under the heading "C", the same burden under the workmen-in-the-street rule as that placed upon a pedestrian. The last two sentences of the instruction shown at page 28 of appellant's brief are as follows: "But while the degree of care is less than that of an ordinary pedestrian, and while such workman has a right to assume that motorists would use ordinary care for his safety, this rule does not mean that such a workman is not bound to use ordinary care for his own safety and may walk into the path of danger without exercising such care. Furthermore, a workman going to and coming from his place of work on the highway must use the same degree of care for his own safety as any pedestrian on the highway." This was far more favorable to the defendant than the authorities on the subject permit, and the fact is that the giving of the instruction which the court did give was error as to the plaintiff.

E. Appellant's claim of error in the court's refusing to give appellant's requested instruction that the workmen-in-the-street rule does not apply to the pedestrian who may only occasionally use the street.

In support of appellant's requested instructions Nos. 3 and 4 it cites only the case of *Milton v. L. A. Motor Coach Co.* (1942) 53 Cal. App. 2d 566, 128 P. 2d 178. There a commercial photographer, at night, was standing in Wilshire Boulevard with a black hood over his head and was viewing through his camera, when he was struck by a motor coach of the defendant. He, nevertheless, recovered a judgment. On appeal, the appellate court held, not that the plaintiff was not entitled to recover, but merely that the evidence of custom of taking photographs in the street was insufficient to charge defendant's driver with knowledge thereof, and that the court erred in its instructions on submission of the case. But for the errors adverted to, the court would have affirmed the judgment. It did send the case back for a new trial.

It is also to be noted that even in these circumstances Justices Carter and Traynor dissented on the denial of a hearing in the Supreme Court.

Appellant again ignores the record in the case showing that the plaintiff was required to perform his duties in the street, that he was in the act of performing them, and that the defendant's driver knew that he would be so engaged.

But, wholly aside from these matters, there is no basis whatsoever for appellant's complaints. The trial court fully covered the subject when it told the jury in its workmen-in-the-street instruction that such instruction applied only "If you find from the evidence that the

plaintiff was required by his duties to be upon the highway, etc." "Required" is synonymous with "necessarily," "compelled," "directed" and the like. (37 W. & P. Perm. 89).

In *Southern Ry. Co. v. Smith,* 59 S.E. 372, the court held that,

> "A yard foreman of a railway company, in the discharge of whose duties it was customary and necessary for him to ride on a yard engine, and whose position on the step of the engine at the time he was thrown therefrom was the usual and proper place for him to be, is an employe 'engaged in service requiring his presence' on an engine."

The instruction given by the court was more favorable to the defendant than the authorities on the subject warrant.

Lastly, the appellant makes the claim that the alleged errors were accentuated by the fact that the court in its instruction described appellee as one of a class "whose duties required them to be" on the highway. It is said that the court committed "error in assuming in view of the conflicting evidence, that appellee's status as a workman in the street had been established as a matter of law".

This claim, we think, is preposterous. The fact is that the language complained of was immediately followed by the statement "If you find that the plaintiff, William A. Bellamy, was upon the highway in such a position that defendant Cement Company's driver in the exercise of reasonable care, could have discovered his presence, but failed to do so, then, and in that event the said driver

was negligent." By this language the court only gives to the plaintiff the benefit of the pedestrian rule and plaintiff was deprived of the benefit of the "workmen in the street" rule and an instruction conforming to the rules of law laid down in the workmen-in-the-street cases, such as "it is the duty of drivers of vehicles to observe the street laborers and to avoid contact with them" (*State Compensation Ins. Fund v. Scamell* (1925) 73 Cal. App. 285, 238 Pac. 780), supra, and "Under such circumstances it is the duty of the driver of a motor vehicle to keep an alert watch for laborers on the street and avoid running them down" (*Woods v. Wisdom* (1933) 133 Cal. App. 694, 24 P. 2d 863, 864), supra.

F. Appellant's claim that the court erred in instructing the jury that plaintiff was lawfully using the highway.

The court did not do so. In perfect propriety it defined the duty of an operator of an automobile. The court submitted to the jury the question whether plaintiff was lawfully using the highway. The sentence in which the phrase is used is contained and is prefaced by the following "If you believe from the evidence that" Instead of taking the question away from the jury the instruction actually submits it as a prerequisite to a finding of negligence. It did not assume by way of recital, or otherwise, that plaintiff was lawfully using the highway.

Incidentally, a comparison with plaintiff's instruction No. 18, as set out at page 37 of appellant's brief reveals the presence of commas in the last sentence making it read, "* * * so as to avoid colliding with plaintiff, lawfully using said highway, then I instruct you that in that event he was negligent", whereas plaintiff's requested

instruction No. 18 as set out in the transcript of the record at pages 22-23 shows the absence of commas, and the quoted provision actually reading "* * * so as to avoid colliding with the plaintiff lawfully using said highway, then I instruct you that, in that event, he was negligent."

Next, appellant makes the statement (Br. for Appellant pp. 37-38) that the trial court "* * * inferred that appellant's driver erroneously assumed that the road was clear, that he was not vigilant, and that he had failed to anticipate or expect the presence of others."

Appellant then makes the bald assertion, "There was no evidence anywhere in the record to support such an inference, and that portion of the instructions was therefore obviously erroneous. Carlson's testimony was otherwise (Tr. 322-343). He actually saw appellee on the train and saw him jump off the train" (Br. for Appellant, p. 38).

The statement is untrue. We have shown it so to be by our Statement of the Case, and particularly at pages 7 to 15.

George P. Lechner testified that following the accident he had a conversation with Carlson, that "I said, 'I didn't see the accident. How did it happen?' And he said, 'Well, I'll be damned if I know. First I know the man was right in front of me, and I tried to miss him, but I guess I didn't' " (344-345).

G. Appellant's claim that the trial court committed prejudicial error in giving plaintiff's proposed instruction No. 19.

In support of its claim of error it says, "There was no evidence whatsoever that appellant's driver failed to discover appellee's presence on the highway or that he looked and did not see" (Br. of Appellant, p. 40). This is the same gross misrepresentation of the record made under appellant's claim of error "F", and our reply is the same as the one we made there, and this disposes of the point.

The appellant complains that in this instruction the court referred to "appellant's driver" (we assume it meant to refer to appellee) as being one of a class "the performance of whose duties require them to be" on the highway.

The instruction, a glance will reveal, is the statement of a general rule of law and the issues submitted to the jury are whether the plaintiff was in such position that defendant's driver, in the exercise of reasonable care, could have discovered his presence. The case of *Clarke v. Volpa Bros.* ((1942) 124 P. 2d 377) cited by appellant, contributes nothing on the subject.

To the contrary, and specifically in point, is the decision of the court in *Bischell v. State* (1945) 68 Cal. App. 2d 557, 157 P. 2d 41, wherein exactly the same shop-worn contention so often used by defendants, was made and overruled. There the court gave an instruction reading, "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it," etc. (p. 44). The defendant claimed "that the instruction assumed as a fact that the fire truck [which

collided with plaintiff's automobile] was clearly visible and clearly audible when, in fact, the evidence on the question was conflicting" (p. 44). Rejecting defendant's contention, the court said (p. 44):

> "There is ample evidence that the fire truck could have been seen and the siren heard by plaintiffs had they exercised reasonable care and vigilance. They offered many reasons why the truck could not have been seen or the siren heard by them. These were questions of fact for the jury to determine. The instruction does not assume that the fire truck was plainly visible or the siren plainly audible, but leaves to the jury the application of the general rule to the facts in the case."

It is of interest in this case that this defendant requested the court to give a total of 48 separate instructions and that the Southern Pacific Company requested the court to give an additional 58 separate instructions—a total of 106.

It is of more than passing interest that this defendant requested that the court give its requested instruction No. 17 on the subject of duty to look, reading as follows:

> "Duty to Look
>
> It was the duty of the plaintiff William A. Bellamy to use reasonable care to look for vehicles on the road before he attempted to use it. This duty is *not* fulfilled by looking and failing to see that which is readily and clearly visible. 'When to *look* is to *see,* the mere statement that one *did* look and *could not* see, will be disregarded as testimony' ".

And that the trial court gave the requested instruction.

If appellant's argument is sound that plaintiff's requested instruction No. 19, complained of here, assumes facts when the court actually submits the issue to the jury, then it must be doubly true that the defendant itself requesting its instruction No. 17, likewise assumes facts against the plaintiff. By the same token, each of the defendant's requested instructions against plaintiff, hereinafter reviewed, assumed the facts against the plaintiff.

A mere reading of the instructions given by the court in this case (351-389) will demonstrate that the trial court "leaned over backwards" in protecting the interests of the defendants before the jury. It will show, on a comparison with the instructions requested by the defendants, that the court actually gave 61 of those requested by defendants. The court, on the subject of liability gives 3 of plaintiff's requested instructions, and defendant complains of each of them.

It will show that, in tenor and spirit as well as in substance, the instructions as a whole are adverse to plaintiff and far more favorable to defendants, and in particular to this defendant, than the applicable law permits. The instructions in large part constitute an admonition against the plaintiff and placed the plaintiff before the jury in a far less favorable light than the defendants.

Aside from the usual stock instructions the trial court instructed the jury that the plaintiff must prove negligence, that the defendants were not insurers, and that plaintiff could not recover unless he proved negligence and that such negligence was the proximate cause of the accident.

The court told the jury that the defendants do not have the burden of proving freedom from negligence, that such burden was on the plaintiff.

It instructed the jury that they were not to be influenced by sympathy, passion, or prejudice.

It told the jury in a *civil* action that, if, after the consideration of the whole case "your minds are in doubt or uncertainty as to the negligence of either of the defendants, etc." (357) it was their duty to return a verdict in favor of the defendant or both of them.

The jury was told that a verdict could not be returned against the defendants merely because an accident happened and his injury resulted from it. The jury was told that if the accident was "inevitable or unavoidable" (358) "the plaintiff is not entitled to recover anything" (358).

It told the jury at this defendant's request, as previously pointed out, that the plaintiff was required to "use reasonable care, to look for vehicles on the road before he attempted to use it" (362). The jury was further instructed that if there were two ways of performing an act, one dangerous and the other safe, the one who with knowledge chooses the perilous one, is guilty of negligence and further that a *person crossing a highway* in front of an approaching vehicle cannot close his eyes to danger, if any, *in reliance upon the presumption* that the other party will use reasonable care and prudence and obey the traffic laws.

The court stated "that a pedestrian who attempts to cross a highway at other than a regular crossing place must exercise greater precaution than at an established crossing" (363).

The jury was told that defendant's driver Carlson "cannot be charged with negligence simply because he might have avoided the accident had he acted differently" (363).

The jury was also told that there was no presumption which defendant's driver was required to indulge that persons alongside the highway "in front of him will not exercise the care requisite to their own safety" (364) and that a motorist "who is himself exercising ordinary care has the *legal right to assume that pedestrians ahead of him" will exercise "the amount of care necessary for their own safety"* (364).

The jury was instructed that if plaintiff's appearance on the highway constituted a confusing emergency, or defendant's driver Carlson was faced with a sudden peril or danger, he could be excused. These were not proper under the evidence.[4]

The jury was told that the *prima facie* speed limit was 55 miles per hour, that the area in which the accident occurred was not sign-posted for any speed limit.

The jury was instructed that the driver need not sound a horn unless it reasonably appears necessary, that if the sound of a horn could not have been heard above the noise of the train, then the failure to sound it was not a proximate cause of the accident.

The court gave but one instruction on the subject of workmen in the street and that is the one complained of in appellant's brief at page 27 under the heading "C". Noth-

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[4]There was no proof of such and the giving of these instructions constituted error (*Perry v. Piombo* (1946) 73 Cal. App. 2d 569, 166 P. 2d 888).

ing was said about the greater care imposed upon the driver by reason of this fact, if found to exist.

The jury was further told that an award of damage, if any, should not be influenced by charity or sympathy, and "Nor can you make a finding against the defendants, based upon mere guess, speculation, or conjecture" (380).[5]

The court told the jury that it was their duty first to ascertain whether or not there was any liability upon a defendant, or either of them, it admonished the jury not to consider the question of damages "*for any purpose*" until they had "*first decided whether or not any defendant is liable*" (381). This admonition was repeated and the court said "the jury is admonished to first consider and decide the question of liability" (381).[6]

The jury was charged "If you make an award in favor of the plaintiff" "they [the damages] must not in any event exceed what is reasonable," nor should they "constitute either a gift or windfall to the plaintiff, or punishment or penalty to the defendants" (385).

The jury was told that if a verdict were returned in favor of the plaintiff "then in making the amount of recovery, you must bear in mind that a defendant is just as much entitled to your consideration as is the plaintiff,"

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[5]In *Midland Valley R. Co. v. Bradley* (10 Cir. 1930) 37 F. 2d 666, it was held that where there was positive circumstantial evidence to support a finding for plaintiff such an instruction was properly refused.

[6]This was improper interference with the deliberations of the jury in performing their function; additionally so, because the injuries in themselves, the nature of the injuries inflicted, tended to establish negligence of defendant's driver.

Ryan v. Burrow (Mo. 1930) 33 S.W. 2d 928, 930;
Sebrell v. Los Angeles Ry. Corporation (1948) 31 Cal. 2d 813, 192 P. 2d 898.

that "The defendant is entitled to protection at your hands against any unjust or unreasonable demand" (385).

The jury was told that the plaintiff could not recover on his full earnings, but only upon the net amount thereof after deduction from income tax.[7]

After subjecting the court to a bombardment of more than one hundred requested instructions, in the hope, we think, that somewhere, somehow the court might fall into error, and even though the court in self-defense and to avoid even the slightest color for a claim of error, gave defendant's requested instructions, the defendant pretends that the case was not fairly tried as to it.

In *Taha v. Finegold* (1947) 81 Cal. App. 2d 536, 184 P. 2d 533, the jury returned a verdict in favor of the defendant. The court, reviewing the instructions as a whole, and we think in a situation strikingly similar to that presented here, called attention to the number of instructions requested by the defendants and the number of such given by the court. It commented on their character and the failule to give corresponding instructions on behalf of the plaintiff. It said (p. 536):

> "An examination of all the instructions given shows a serious situation, and justifies the objections of

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[7]In *Stokes v. United States* (2 Cir. 1944) 144 F. 2d 82, 87, refusal to make a deduction for income taxes in the estimate of the expected earnings was held proper.

In *Chicago & N.W. Ry. Co. v. Curl* (8 Cir. 1949) 178 F. 2d 497, it was held proper to refuse to receive defendant's offer of proof of plaintiff's net earnings after deductions (citing the *Stokes* case, supra; *Cole v. Chicago, St. P. M. & O. Ry. Co.* (Minn. 1945) 59 F. Supp. 443, 445; *Majestic v. Louisville & N.R. Co.* (6 Cir. 1945) 147 F. 2d 621, 626-627).

The rule is likewise stated in the annotation on the subject in 9 A.L.R. 2d 320.

> plaintiff. * * * The whole result was an unnecessary and obvious emphasis upon the duties of the pedestrian and an extremely light stress on the duties of the truck driver."

It said (p. 537):

> "* * * a reading of the instructions as a whole gives the definite feeling that the court, either intentionally or unintentionally, was telling the jury that as the plaintiff admittedly looked only once, the verdict should be for the defendants."

It concluded (p. 538), "Plaintiff was thereby deprived of a fair trial," and reversed the judgment.

In *Southern Pac. Co. v. Guthrie* (9 Cir. 1949) 180 F. 2d 295, this court reviews the refusal of United States District Judge Louis E. Goodman to give defendant's requested instructions, many of them duplicates of those the court did give here. It held that their refusal was not error, and said (pp. 301-302):

> "While some of these requested instructions might properly have been added to the charge, yet we find no prejudicial error in their omission. Others were properly refused for other reasons. Some were peremptory, and therefore, for reasons we have previously stated in commenting upon proof of negligence, they were properly rejected."

III. CONCLUSION.

We think it clearly appears that the issues of negligence and contributory negligence were issues of fact for the jury's determination.

We think the case was tried and submitted under rulings and instructions much more favorable to the defendant than the law prescribes.

We suggest that this appeal is groundless and that this court should invoke the provisions of Rule 26(2) of the rules of this court.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco, California,
June 2, 1950.

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